American Bar Association
www.supremecourtpreview.org

No. 08-267

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE UNITED STATES

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

I. This Court has jurisdiction under 28 U.S.C. 1259(4) 3
II. The military appellate courts lack jurisdiction to adjudicate a former service member's coram nobis challenge to the merits of his final court-martial conviction 8
A. Coram nobis review of a final court-martial conviction does not "aid" any existing jurisdiction of a military appellate court 8
1. Respondent relies on the CAAF's pre-*Goldsmith* conception of writ jurisdiction rejected by this Court 8
2. The UCMJ does not confer jurisdiction to hear coram nobis challenges to final court-martial convictions 10
3. The military courts also lack jurisdiction because respondent is a former service member no longer subject to the UCMJ 20
B. Coram nobis review of the merits of a final court-martial conviction is neither necessary nor appropriate 22
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Burns v. *Wilson*, 346 U.S. 137 (1953) 14
Calderon v. *Moore*, 518 U.S. 149 (1996) 4
Carcieri v. *Salazar*, No. 07-526 (Feb. 24, 2009) 13
Carlisle v. *United States*, 517 U.S. 416 (1996) 22
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 16

Cases—Continued: Page

Clinton v. *Goldsmith*, 526 U.S. 529 (1999) ..... *passim*
Gusik v. *Schilder*, 340 U.S. 128 (1950) 11
Hall v. *Thwing*, 30 M.J. 583 (A.C.M.R. 1990) 18
Health Cost Controls of Ill., Inc. v. *Washington*, 187 F.3d 703 (7th Cir. 1999), cert. denied, 528 U.S. 1136 (2000) 5
Howell v. *Mississippi*, 542 U.S. 936 (2004) 3
Kansas v. *Marsh*, 548 U.S. 163 (2006) 7
McClaughry v. *Deming*, 186 U.S. 49 (1902) 19, 20
Mercantile Nat'l Bank v. *Langdeau*, 371 U.S. 555 (1963) 7
Noyd v. *Bond*, 395 U.S. 683 (1969) 18
Panetti v. *Quarterman*, 127 S. Ct. 2842 (2007) 4
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 16
Schlesinger v. *Councilman*, 420 U.S. 738 (1975) .. 11, 14, 16
Smith v. *Vanderbush*, 47 M.J. 56 (C.A.A.F. 1997) 20
Solorio v. *United States*, 483 U.S. 435 (1987) 25
United States v. *Dearing*, 63 M.J. 478 (C.A.A.F. 2006) .. 18
United States v. *DuBay*, 37 C.M.R. 411 (C.M.A. 1967) .. 24
United States v. *Frischholz*, 36 C.M.R. 306 (C.M.A. 1966) 15
United States v. *Ginn*, 47 M.J. 236 (C.A.A.F. 1997) 4
United States v. *Meadows*, 13 M.J. 165 (C.M.A. 1982) ... 20
United States v. *Morgan*, 346 U.S. 502 (1954) 12
United States v. *Rodriguez*, 60 M.J. 239 (C.A.A.F. 2004) 25
United States v. *Stevens*, 27 C.M.R. 491 (C.M.A. 1959) .. 18

Cases—Continued: Page

United States v. *Wheeler*, 28 C.M.R. 212 (C.M.A. 1959) . . 19
United States ex rel. Toth v. *Quarles*, 350 U.S. 11 (1955) 2, 20
Wright v. *United States*, 2 M.J. 9 (C.M.A. 1976) 19

Constitution, statutes, regulation and rules:

U.S. Const.:
Art. I 10, 12, 15, 19
§ 8, Cl. 14 . . . . . 2, 20
Art. III 11, 12, 17, 19, 22
All Writs Act, 28 U.S.C. 1651 . . . . . 1, 15
28 U.S.C. 1651(a) 8, 22
Military Justice Act of 1968, Pub. L. No. 90-632, § 2, 82 Stat. 1341-1342 17
Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 17
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
10 U.S.C. 802 21
10 U.S.C. 827(a)(1) (Art. 27) 25
10 U.S.C. 866 (Art. 66) 10, 12, 16
10 U.S.C. 866(f) (Art. 66(f)) 10
10 U.S.C. 866-876 2
10 U.S.C. 867 (Art. 67) 10, 12
10 U.S.C. 867(a)(1) (Art. 67(a)(1)) 6
10 U.S.C. 867(a)(2) (Art. 67(a)(2)) 6
10 U.S.C. 867(a)(3) (Art. 67(a)(3)) 6
10 U.S.C. 867(c) 5

Statutes, regulation and rules—Continued: Page

10 U.S.C. 869(b) (Art. 69(b)) 12
10 U.S.C. 870(c)(2) (Art. 70(c)(2)) 24
10 U.S.C. 873 (Art. 73) 2, 12, 13, 14, 21
10 U.S.C. 875(b) (Art. 75(b)) 22
10 U.S.C. 876 (Art. 76) 2, 11, 12, 18
10 U.S.C. 944 (Art. 144) 10
28 U.S.C. 1254(1) 6
28 U.S.C. 1257 7
28 U.S.C. 1259 ..... 5, 6, 7
28 U.S.C. 1259(1) 6
28 U.S.C. 1259(2) 6
28 U.S.C. 1259(3) 6
28 U.S.C. 1259(4) 2, 3, 4, 5, 6, 7
28 U.S.C. 2241 11
32 C.F.R. 150.2(c) 10
C.A.A.F. R.:
Rule 4(b) 16
Rule 4(b)(1) 5
Rule 4(b)(2) 7
Rule 4(c) 10
Courts-Martial R.:
Rule 201(b) 19
Rule 201(b)(5) note 19
Rule 907(b)(1)(A) 20
Rule 1210(b) 21
Crim. App. R. 2(c) 10

Miscellaneous: Page

1 *Advisory Commission Report: Military Justice Act of 1983* (visited Mar. 10, 2009) <http://www.loc.gov/rr/frd/Military_Law/pdf/ACR 1983-I.pdf> 17

95 Cong. Rec. 5719 (1949) 13

H.R. Rep. No. 549, 98th Cong., 1st Sess. (1983) 7

Manual for Courts-Martial, United States (1951) 19

Military Justice: Joint Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services, 89th Cong., 2d Sess. (1966) 15, 17

Military Justice Act of 1982: Hearings Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97th Cong., 2d Sess. (1982) 16

2A Norman J. Singer, *Statutes and Statutory Construction* (7th ed. 2007) 13

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 5

Trials by Courts-Martial: Hearings on S. 5320 Before the Senate Comm. on Military Affairs, 65th Cong., 3d Sess. (1919) 20

Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. (1949) 13

In the Supreme Court of the United States

No. 08-267

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE UNITED STATES

The divided Court of Appeals for the Armed Forces (CAAF) held that military appellate courts possess open-ended jurisdiction under the All Writs Act, 28 U.S.C. 1651, to hear a coram nobis petition attacking the merits of a court-martial judgment that has long since become final. Three bedrock principles require reversal of that decision.

First, the jurisdiction of military appellate courts, as Article I courts, is strictly limited to the bases of jurisdiction expressly conferred upon them by statute. Gov't Br. 16 & n.2; see, *e.g.*, *Clinton* v. *Goldsmith*, 526 U.S. 529, 533-534 (1999). Second, because the All Writs Act is not an independent grant of jurisdiction, the Uniform Code of Military Justice (UCMJ) itself must provide a basis of jurisdiction that a writ of coram nobis can aid. Gov't Br. 13-16; see *Goldsmith*, 526 U.S. at 534-535. Third, none of the jurisdiction conferred in the UCMJ is aided by a coram nobis petition of a former service member whose conviction is final

and whose discharge has been executed. Gov't Br. 17-21; see 10 U.S.C. 866-876.

Respondent does not refute any of the three propositions set forth above. Rather, as a threshold matter, respondent repeats his objection to this Court's authority under 28 U.S.C. 1259(4) to hear this case. There can be no serious question, however, that the CAAF granted respondent meaningful "relief," as required by Section 1259(4), by reversing the Navy-Marine Corps Criminal Court of Appeals (N-MCCA) decision denying his coram nobis petition and by remanding for further proceedings. Respondent raises no new legal or factual ground to support dismissal of the writ of certiorari as improvidently granted.

As to the question presented, respondent contends that because the military appellate courts *once* possessed jurisdiction under the UCMJ to review his court-martial conviction, those courts have continuing appellate jurisdiction to conduct that review via the All Writs Act *at any time*. That repeats the mistake that the CAAF made and that this Court corrected in *Goldsmith*. Such a result would undermine binding Article 76 finality and would eviscerate Congress's carefully crafted limits on collateral review within the military justice system. 10 U.S.C. 876. That includes limits on coram nobis relief that, according to unrebutted legislative history, Congress subsumed within Article 73's new-trial provision. 10 U.S.C. 873.

Respondent also attempts to circumvent the military appellate courts' lack of constitutional authority to adjudicate the claims of a former service member no longer subject to the UCMJ. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); U.S. Const. Art. I, § 8, Cl. 14. Respondent relies on inapposite cases involving an intervening discharge during *direct* appellate review. And respondent is incorrect that the government asserts the

power to retry a former service member by court-martial after reversal of his final conviction on collateral review, when that service member is beyond his enlistment period and no longer in military custody.

In any event, coram nobis review is neither necessary nor appropriate here. Respondent does not dispute that, as a general matter, several alternative avenues exist for seeking the relief he now seeks. His untimeliness (justifiable or not) in seeking those remedies in this case cannot invest the military courts with jurisdiction that they do not otherwise possess. Doing so would create burdens on the military justice system that Congress did not design it to bear and that it has never borne in its 200-year history until the CAAF's modern departures.

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. 1259(4)

Section 1259(4) of Title 28 provides that this Court may review "[d]ecisions" of the CAAF in four classes of "[c]ases," including ones not otherwise specified "in which the [CAAF] granted relief." Respondent contends (Br. 6-13) that, although the CAAF reversed the N-MCCA's denial of his claim, the CAAF did not "grant[] relief" because it remanded for further fact-finding rather than grant his claim outright. He urges that the writ of certiorari should thus be dismissed as improvidently granted. *Id.* at 13.

Respondent made the same jurisdictional-defect argument in his opposition to the petition for certiorari (Br. 4-6), and the government responded to it in its reply (Br. 2-4). The Court nevertheless granted review, without directing the parties to address this Court's jurisdiction. See, *e.g.*, *Howell* v. *Mississippi*, 542 U.S. 936 (2004) (granting certiorari and directing parties to brief

additional issue—raised in the opposition to certiorari—of Court's jurisdiction). And respondent presents no new factual or legal development to support reconsideration of the Court's grant.

In any event, respondent's interpretation of 28 U.S.C. 1259(4) is without merit. As previously explained (Cert. Reply Br. 2-3), Section 1259(4) requires only "relief," not "complete relief" or "ultimate relief on the merits." The CAAF plainly "granted relief" to respondent by affirming the N-MCCA's jurisdiction to hear his petition, reversing the N-MCCA's denial of his claim on the merits, and remanding for further factfinding on that claim. Pet. App. 1a-32a. In both ordinary and legal parlance, respondent won his appeal; it was the government that (unsuccessfully) sought reconsideration of the CAAF's decision. *Id.* at 61a. While respondent may have preferred the CAAF also to decide the merits of his claim in his favor (notwithstanding the lack of any factual development), the CAAF still granted him meaningful relief. See, *e.g.*, *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (per curiam) (recognizing that "effectual relief" can consist of a "partial remedy" in a party's favor). Indeed, it is common for this Court to reverse a judgment and remand for further factual development, thereby granting "relief," if not the ultimate relief that the party may seek. See, *e.g.*, *Panetti* v. *Quarterman*, 127 S. Ct. 2842, 2863 (2007).

Respondent's cramped conception of "relief" ignores the CAAF's role as an appellate tribunal. The CAAF itself has recognized that a reversal and remand for further proceedings is a common and important form of relief for a party that has lost in a lower court. See *United States* v. *Ginn*, 47 M.J. 236, 238 (1997) (noting that "appellant has not averred or shown sufficient prej-

udice to now warrant a factfinding hearing or any *other* appellate relief") (emphasis added). Because the CAAF lacks factfinding authority (see 10 U.S.C. 867(c)), a remand for a factual hearing is often the only remedy it can provide. That will be true not only in cases such as this one where the lower court has not resolved a factual dispute pertinent to the relief sought, but in any case where a petitioner invokes original jurisdiction in the CAAF to secure coram nobis relief (see C.A.A.F. R. 4(b)(1)).[1]

Respondent further contends that review is available in this Court under Section 1259—including but not limited to Section 1259(4)—only if the CAAF decides a case "on its merits," which he construes to mean a plenary disposition of the moving party's underlying claim. Resp. Br. 7 (quoting Eugene Gressman et al., *Supreme Court Practice* 128 (9th ed. 2007) (*Supreme Court Practice*)).[2] But the structure of Section 1259 negates such

[1] The cases on which respondent relies (Br. 8) for his construction of the term "relief" in Section 1259(4) are inapposite. The Seventh Circuit's decision in *Health Cost Controls of Illinois, Inc.* v. *Washington*, 187 F.3d 703, 706-707 (1999), cert. denied, 528 U.S. 1136 (2000), concerned the distinct question whether the grant of summary judgment by a district court constitutes the entry of a "judgment" for the purpose of appellate jurisdiction. The remaining cases cited by respondent address primarily the "prevailing party" requirement for fee shifting—a very different purpose.

[2] Read in context, it is apparent that the cited treatise equates a decision in a case "on its merits" in the CAAF with any decision following a grant of review by the CAAF: "if the [CAAF] does not grant a petition for review, *and thus does not decide a case on its merits*, the Supreme Court has no jurisdiction to review that inaction by way of certiorari." *Supreme Court Practice* 128 (emphasis added). The treatise thus does not suggest that this Court's jurisdiction attaches under Section 1259 only to cases in which the CAAF grants a petitioner the ultimate relief he seeks.

a construction. Section 1259(1) authorizes certiorari jurisdiction in capital cases "reviewed by" the CAAF under Article 67(a)(1); Section 1259(2) authorizes certiorari jurisdiction in cases "certified to" the CAAF at the direction of the Judge Advocate General (JAG) under Article 67(a)(2); and Section 1259(3) authorizes certiorari jurisdiction in cases in which the CAAF "granted a petition for review" under Article 67(a)(3). As previously observed, in each of those categories, the remedy afforded the prevailing party upon the exercise of the CAAF's jurisdiction may entail a remand for further proceedings. Cert. Reply Br. 4 (collecting cases). Yet nothing in Section 1259 suggests that a remand or other partial relief in the disposition of such cases forecloses certiorari review. There is no reason to suppose that Congress contemplated the more restrictive rule suggested by respondent with respect to the remaining CAAF decisions covered by Section 1259(4).[3]

Respondent's juxtaposition (Br. 12) of 28 U.S.C. 1259 against 28 U.S.C. 1254(1) does not support his argument either. While it is true that Section 1254(1) permits certiorari even *before* "rendition of a judgment" of a federal court of appeals, while Section 1259 does not with respect to the CAAF, there is no question here that the CAAF has issued a decision. The more salient compari-

---

[3] Contrary to respondent's contention (Br. 12), the fact that Section 1259(3) requires the CAAF to have "granted a petition for *review*" whereas Section 1259(4) requires the CAAF to have "granted *relief*" does not mean that "relief" entails plenary disposition of the underlying claim (emphases added). It simply means that in cases involving petitions for extraordinary relief subject to 1259(4), certiorari jurisdiction attaches only when the CAAF grants some measure of relief—*i.e.*, something other than dismissal or denial—even if not the ultimate remedy sought in the petition.

son is that of Section 1259—which authorizes certiorari review of "[d]ecisions" of the CAAF—to Section 1257—which authorizes certiorari review only of "[f]inal judgments" of state courts. That textual distinction defeats respondent's suggestion (Br. 7) that Section 1259 imposes a "final judgment" requirement. In any event, even if a "final judgment" requirement applied, it would not pose a bar to review in this case given the distinct and antecedent nature of the issue on which certiorari was granted and given the fact that this Court's review may well be unavailable following remand. See, *e.g.*, *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 557-558 (1963) (according finality despite remand for trial on the merits because venue issue was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action"); *Kansas* v. *Marsh*, 548 U.S. 163, 167 (2006) (according finality despite remand for new trial because the State would have no later opportunity to seek review of the federal issue).[4]

Congress enacted Section 1259 in part to afford the government "judicial recourse from adverse decisions" issued by the CAAF. See H.R. Rep. No. 549, 98th Cong., 1st Sess. 16 (1983). Respondent's construction of the term "relief" as employed in Section 1259(4) would insulate CAAF decisions from this Court's review where the CAAF has overextended its jurisdiction but withheld final relief on the merits. Particularly when an asserted jurisdictional error results in a remand for further pro-

[4] As respondent appears to acknowledge (Br. 13 n.5), if the N-MCCA denies respondent relief on the merits, then the CAAF could deny further review in its discretion (C.A.A.F. R. 4(b)(2)) or, even if it took the case, affirm the denial of relief. Either way, Section 1259 would provide the government no basis to seek this Court's review.

ceedings that, if the government is correct, should never transpire, respondent's position would frustrate an important legislative purpose.

II. THE MILITARY APPELLATE COURTS LACK JURISDICTION TO ADJUDICATE A FORMER SERVICE MEMBER'S CORAM NOBIS CHALLENGE TO THE MERITS OF HIS FINAL COURT-MARTIAL CONVICTION

A. Coram Nobis Review Of A Final Court-Martial Conviction Does Not "Aid" Any Existing Jurisdiction Of A Military Appellate Court

*1. Respondent relies on the CAAF's pre-*Goldsmith *conception of writ jurisdiction rejected by this Court*

This Court's decision in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), held that the All Writs Act "confine[s] the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction" and "does not enlarge that jurisdiction." *Id.* at 534-535 (quoting 28 U.S.C. 1651(a)). Respondent concedes (Br. 14, 16) that, as a result, the military courts must have an independent basis of jurisdiction to entertain his petition for extraordinary relief.

Despite that concession, respondent implicitly relies on the CAAF's flawed, pre-*Goldsmith* conception of All Writs Act jurisdiction. Respondent premises (Br. 14) his present assertion of military appellate court jurisdiction on the fact that, nine years ago, his case on direct appeal "had been reviewed and affirmed by the Navy Court" subject, *at that time*, to CAAF review under the UCMJ. To support the untenable claim that the All Writs Act could "aid" the military appellate courts' *current* jurisdiction because they had possessed jurisdiction (on direct appeal) in the past, respondent argues (Br. 16) that *Goldsmith*'s reference (526 U.S. at 534-535) to "ex-

isting statutory jurisdiction" lacks any temporal dimension. But that cannot be squared with the *Goldsmith* Court's ensuing explanation that "there is no source of *continuing* jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Id.* at 536 (emphasis added).

Respondent repeats the mistake of the CAAF's decision below and in *Goldsmith*, where this Court held that "the CAAF spoke too expansively when it held itself to be 'empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in [the CAAF] after review in the intermediate court." 526 U.S. at 536-537. The CAAF is not "a plenary administrator even of criminal judgments it has affirmed." *Id.* at 536. This Court thus made clear that the military appellate courts' jurisdiction under the UCMJ to review the findings and sentence of a court-martial does not afford those courts an independent source of *perpetual* jurisdiction over the case.[5]

---

[5] Respondent (Br. 15-16) and his amici (Br. of Law Professors 16-17; Br. of Former JAGs et al. 21) alternatively argue that *Goldsmith* does not control because that case precluded the CAAF from employing the All Writs Act to correct an executive action. As explained above and in our opening brief (Br. 14-15), the *Goldsmith* Court did not simply reverse the CAAF on that narrow ground; it rejected the broader proposition that the CAAF possessed continuing jurisdiction under the All Writs Act long after it has lost jurisdiction under the UCMJ to alter the findings and sentence of a court-martial.

2. The UCMJ does not confer jurisdiction to hear coram nobis challenges to final court-martial convictions

a. As explained in our opening brief (at 16-18), the military appellate courts are Article I courts and thus strictly limited to the bases of jurisdiction conferred by Congress in the UCMJ. See *Goldsmith*, 526 U.S. at 533-534. Pursuant to Articles 66 and 67, the UCMJ provides a "narrowly circumscribed" regime for military appellate court review: direct, record-based review of court martial convictions and sentences. *Id.* at 535; 10 U.S.C. 866, 867. Respondent does not (and cannot) point to anything in the UCMJ conferring jurisdiction on either the CAAF or the courts of criminal appeals to entertain collateral attacks on the merits of final court-martial judgments. See Resp. Br. 18 ("*Goldsmith* cites nothing in the UCMJ for the proposition that an appellate military court may grant extraordinary relief in a final case.").

Instead, respondent contends that Articles 66(f) and 144—which respectively grant authority to the JAG to "prescribe uniform rules of procedure for Courts of Criminal Appeals" (10 U.S.C. 866(f)) and to the CAAF to "prescribe its rules of procedure" (10 U.S.C. 944)—enable the military courts, absent any statutorily defined procedure for collateral review, to determine the scope of collateral review "through the common law process and exercise of those rulemaking powers." Resp. Br. 27. But the implication that military courts have power to expand the scope of their own jurisdiction through procedural rulemaking powers subverts basic principles of Article I court jurisdiction. Gov't Br. 16 & n.2; see C.A.A.F. R. 4(c) ("These Rules shall not be construed to extend or to limit the jurisdiction of the [CAAF] as established by law."); Crim. App. R. 2(c) (codified at 32

C.F.R. 150.2(c)) ("Nothing in this part shall be construed to extend or limit the jurisdiction of the Courts of Criminal Appeals as established by law.").

Article 76 finality—attaching to final court-martial judgments ordered into execution, 10 U.S.C. 876—poses an additional, affirmative restraint on collateral military review. See Gov't Br. 18-19. As the CAAF did below (Pet. App. 9a), respondent attempts to evade that bar by labeling it merely "prudential." Resp. Br. 38-39 (citing *Schlesinger* v. *Councilman*, 420 U.S. 738, 749 (1975)). But *Councilman* addressed Article 76's effect on the availability of collateral review in *Article III* courts, and the government agrees that Article 76 does not bar such review outside the *Article I* military court system (see Gov't Br. 20-21), where separate statutory bases of jurisdiction exist. *E.g.*, 28 U.S.C. 2241. Indeed, *Councilman* itself recognized that "the finality clause" of the predecessor to Article 76 "describ[es] the terminal point for proceedings *within the court-martial system*." 420 U.S. at 750 (emphasis added) (quoting *Gusik* v. *Schilder*, 340 U.S. 128, 132 (1950)). Contrary to respondent's contention (at 41-43), and as explained in our opening brief (at 21), *Councilman*'s citation of the CAAF's decision in *Frischholz* for the unobjectionable proposition that Article 76 finality is not a complete bar to collateral review "in an appropriate forum" (420 U.S. at 753 n.26) in no way suggests approval of *Frischholz*'s broader view that a writ of error coram nobis is available in military courts to attack final court-martial convictions—an issue that this Court had no occasion to consider.[6]

[6] Respondent notes (Br. 17-18) that this Court in *Goldsmith* did not rely on Article 76 finality to preclude the exercise of the CAAF's jurisdiction under the All Writs Act. But that is unsurprising given that Goldsmith's challenge to a separate administrative action did not

Likewise, this Court's decision in *United States* v. *Morgan*, 346 U.S. 502 (1954), does not bear on the availability of coram nobis in the Article I military courts; rather, it dealt with the availability of the writ in an Article III district court. The many distinguishing features of the military justice system—including the statutorily limited scope of appellate review (see Articles 66 and 67), the unique finality of executed military orders (see Article 76), and the lack of standing trial courts (see Gov't Br. 36-39)—render *Morgan* inapplicable here.

As explained in our opening brief (at 19-20, 25-26), the UCMJ provides a single mechanism (beyond Secretarial or Presidential action) for collateral review of a final court-martial conviction and sentence within the military justice system: Article 73's petition for a new trial. 10 U.S.C. 873, 876. An express exception to Article 76 finality, Article 73 permits an accused to petition the JAG for a new trial on the ground of newly discovered evidence or fraud on the court within two years after approval by the convening authority of a court-martial sentence. *Ibid.* Respondent offers no response to the concern that his sweeping view of the availability of collateral review in the military courts would eviscerate Congress's limits on such review and render Article 73 both toothless and redundant.[7]

---

squarely implicate Article 76 finality; indeed, the government did not raise Article 76 as a bar in that case. Rather, *Goldsmith* was properly resolved on the ground that the CAAF lacked any independent jurisdictional basis over the challenge.

[7] Unlike Article 73, Article 69(b) (pertaining to JAG review in cases not reviewed under Article 66) provides an exception for "good cause for failure to file within" the two-year time limit. Compare 10 U.S.C. 869(b), with 10 U.S.C. 873. Therefore, when Congress intended there

b. Respondent's response to Article 73's legislative history on the precise issue now before the Court is equally unsatisfying. As explained in our opening brief, Felix Larkin of the Department of Defense testified before Congress before its enactment that Article 73 was intended specifically to supplant the common law writ of error of coram nobis and integrate it into the new-trial petition. Gov't Br. 25-26 (quoting *Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1211 (1949) (*1949 UCMJ Hearings*)). While the probative nature of such comments might be subject to debate if made by just any "departmental witness[]" (Resp. Br. 29), Mr. Larkin served as the chairman of the seven-month working group charged with drafting the UCMJ. See 95 Cong. Rec. 5719 (1949). He thus spoke authoritatively when explaining that "[w]hat *we* did was to combine what amounts to a writ of error coram nobis with the motion for a new trial on newly discovered evidence." *1949 UCMJ Hearings* 1211 (emphasis added); see *Carcieri* v. *Salazar*, No. 07-526 (Feb. 24, 2009), slip op. 10 n.5 (noting view of statute's "principal author"); 2A Norman J. Singer, *Statutes and Statutory Construction* § 48:10, at 587 (7th ed. 2007) ("Statements of the draftsman of a proposed bill concerning his understanding of its nature and effect, made at the committee hearings, have been accepted in federal courts as indicative of legislative intent. If the bill * * * remains unchanged it is reasonably assumed that the legislature adopted the view of the draftsman.") (collecting cases).

---

to be an exception to time constraints to post-conviction review under the UCMJ, it so stated.

That Article 73 is not coterminous in breadth with the common law writ of coram nobis does not make Mr. Larkin's considered testimony "superficial and incorrect." Resp. Br. 29, 33 & n.15. The point is that the ill-defined common law writ was tailored in Article 73 to comport to the unique demands of the military justice system. The testimony leaves no doubt that the drafters of Article 73 perceived the new-trial motion as the exclusive vehicle, *within the military court system*, for making post-finality challenges to court-martial convictions. See *Burns* v. *Wilson*, 346 U.S. 137, 141 (1953) (noting, in reference to Article 73, "Congress has provided a special post-conviction remedy *within the military establishment*, apart from ordinary appellate review") (emphasis added).

As explained in our opening brief (at 22-25), the UCMJ's careful limits on collateral review within the military justice system are consistent with historical practice since the Nation's founding. Respondent does not cite a single instance before 1966 of a military court recognizing jurisdiction to adjudicate a collateral attack (let alone via a writ of error coram nobis) of a final court-martial conviction (Resp. Br. 13 & n.6), and the government is not aware of one before then. Although this Court has recognized such practice in *civilian* courts since the early nineteenth century (*Councilman*, 420 U.S. at 747-748), there is no such historical practice in the military courts. To the contrary, the UCMJ's provision for direct appellate review within the criminal courts of appeal and the CAAF, along with Article 73's new-trial provision, created a highwater mark of process within the military justice system. Accordingly, the CAAF's relatively recent but dramatic expansion of military-court jurisdiction—untethered to the text or

history of the UCMJ—not only contravenes basic principles of limited Article I court jurisdiction, but also belies any claim to "settled law" (Resp. Br. 44).

c. Nor is there validity to respondent's claim that the Executive and Legislative Branches have endorsed the CAAF's post-1966 approach. Although the government once suggested before a district court that a coram nobis petition challenging a final court-martial conviction should be brought in a military court instead, it returned to the position it had taken before then (and since) when that matter arose in the Court of Military Appeals (CMA) (predecessor to the CAAF): the military court "has no power 'to entertain and consider' the accused's application because it is outside the scope of jurisdiction conferred * * * by Article 67 and prohibited by Article 76." *United States* v. *Frischholz*, 36 C.M.R. 306, 307 (C.M.A. 1966) (internal citation omitted); see Resp. Br. 49 n.24 ("The United States has consistently denied [the CMA] had such authority [to entertain a writ of error coram nobis], except for a recent instance [referring to the district court litigation in *Frischholz*].") (quoting *Military Justice: Joint Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess. 303 (1966) (*1966 Joint Hearings*) (testimony of Judge Homer Ferguson, CMA)). In any event, the Executive's position in *Goldsmith*, reiterated in this case, resolves any doubt about its considered view. See Gov't Br. 17-18, *Goldsmith*, *supra* (No. 98-347) (arguing that the CAAF "may issue a writ under 28 U.S.C. 1651 only when the writ is issued 'in aid of' [its] existing or potential appellate jurisdiction," such that the All Writs Act does not provide the CAAF a "free-floating continuous source of jurisdic-

tion"); see also Gov't Jurisdictional Br. 7, *Councilman*, *supra* (No. 73-662) (Congress intended Article III-court collateral review to be "the sole exception to the finality of actions within the military court system").[8]

Respondent's claim (at 48-56) of congressional ratification by acquiescence is equally unfounded. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation.") (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (internal quotation marks omitted; brackets in original)). The congressional testimony of Judge Ferguson—a principal source for respondent's argument—actually undercuts it. Judge Ferguson proposed an amendment to Article 66 of the UCMJ that

---

[8] Contrary to respondent's contention (Br. 47-48), the government's arguments in a pair of lower court cases after the CMA's decision in *Frischholz* but before *Goldsmith* establish nothing more than an acknowledgment of military-court precedent since 1966. The same is true for the 1982 testimony of the Department of Defense's General Counsel referring to the channeling of "claims for post-conviction relief into the avenues established for such actions by Congress in the UCMJ." Resp. Br. 51-52 (quoting *The Military Justice Act of 1982: Hearings Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2d Sess. 36 (1982) (statement of William H. Taft, IV)). Likewise, the fact that rules advisory committees proposed and the CAAF and JAGs for the Courts of Criminal Appeals ultimately adopted procedural rules (predating *Goldsmith*) for extraordinary writ petitions, including coram nobis (Resp. Br. 53-55), simply reflects implementation of those courts' own precedent—even if incorrect. Compare, *e.g.*, C.A.A.F. Rule 4(b) (permitting original jurisdiction over extraordinary writ petitions), with *Goldsmith*, 526 U.S. at 537 n.10 (CAAF "was simply wrong when it treated itself as a court of original jurisdiction.").

would have conferred upon the CMA the "power to entertain a writ of error in the nature of coram nobis in all court-martial cases to which its appellate jurisdiction originally extended and grant such relief to the petitioner as it may deem required." *1966 Joint Hearings* 303. Yet when Congress enacted extensive amendments to the UCMJ two years later, including an increased role for the military appellate courts, it did not include the proposed amendment. See Military Justice Act of 1968, Pub. L. No. 90-632, § 2, 82 Stat. 1341-1342. Nor has Congress done so since then,[9] even in the wake of this Court's decision in *Goldsmith* rejecting the CAAF's broad view. If anything, the legislative record thus suggests congressional *rejection* of the notion that military appellate courts should exercise coram nobis jurisdiction.

d. In our opening brief (at 27-29), we acknowledged that military appellate courts are empowered to issue relief under the All Writs Act in limited circumstances. Respondent's attempt (Br. 18-21) to characterize that established proposition as "contradict[ing]" the argument against limitless continuing military jurisdiction to challenge final court-martial convictions does not withstand scrutiny.

---

[9] Before and after the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, Congress declined to adopt related recommendations to enlarge the jurisdiction of the military appellate courts, *e.g.*, conferral of Article III status on the CAAF and authorization of coram nobis jurisdiction. See 1 *Advisory Commission Report: Military Justice Act of 1983*, at 11 (recommending Article III status for CAAF), 73 (statement of Chief Judge Albert B. Fletcher, Jr., CMA, proposing coram nobis power) (submitted to Congress on Dec. 14, 1984) <http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf> (visited Mar. 10, 2009).

First, the most significant category consists of cases "which may ultimately be reviewed by that [military appellate] court," *i.e.*, cases in which no final court-martial conviction and sentence has arisen yet. *Noyd* v. *Bond*, 395 U.S. 683, 695 n.7 (1969). That may occur, for example, where the accused seeks release before completion of the appellate process or where a party seeks interlocutory review of a ruling during a court-martial proceeding. See, *e.g.*, *United States* v. *Dearing*, 63 M.J. 478 (C.A.A.F. 2006) (granting writ of mandamus for accused's release despite prior remand for rehearing because time served exceeded maximum confinement on remaining charge); *Hall* v. *Thwing*, 30 M.J. 583 (A.C.M.R. 1990) (granting writ of mandamus for dismissal of charges for speedy-trial violation). Such adjudications are reasonably considered "in aid of" military appellate jurisdiction and occur before Article 76 finality attaches.

Second, military court authority to *compel adherence* to a final judgment says nothing about the authority to *alter or overturn* that judgment; only the latter (invoked by respondent's coram nobis petition) threatens to undermine the finality of an approved court-martial judgment. Compelling adherence to a judgment *preserves* its finality.[10]

Third, contrary to respondent's assertion (Br. 18), the government made no "concession[]" as to the author-

[10] Moreover, a convening authority's order of punishment greater than that authorized by the military courts is not an "action taken pursuant to th[e] proceedings" of a court-martial and thus is not itself entitled to Article 76 finality. 10 U.S.C. 876; cf. *United States* v. *Stevens*, 27 C.M.R. 491, 492 (C.M.A. 1959) ("purported actions of the convening authority in the case were contrary to the Order of this court and void and of no effect").

ity of military appellate courts to hear collateral challenges to a military judgment on the basis that the tribunal that entered the judgment had lacked jurisdiction. Rather, given that the CAAF has recognized such authority (over the government's objection), the government stated (Br. 29 & n.7)—"assuming *arguendo*" the authority existed—that its exercise could reasonably be characterized as "in aid of" determining jurisdiction, thereby reinforcing rather than trammeling upon the UCMJ's statutorily defined limits. In any event, such authority does not necessarily implicate the same finality concerns because a traditional jurisdictional defect (*i.e.*, an improperly constituted tribunal or lack of jurisdiction over the offense or offender) renders the court-martial proceeding void *ab initio* under military law. See, *e.g.*, *McClaughry* v. *Deming*, 186 U.S. 49, 65 (1902) (jurisdictional defect renders court-martial "in law no court"); *United States* v. *Wheeler*, 28 C.M.R. 212, 215 (C.M.A. 1959) ("If the court lacks jurisdiction or if the charges fail to allege any offense under the code, the proceedings are a nullity.") (quoting *Manual for Courts-Martial, United States* ¶ 68b(1) (1951)); R. for Courts-Martial 201(b)(5) (R.C.M.), note ("The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect.").[11]

[11] That Article III courts in some contexts have interpreted "jurisdictional" defects to encompass certain constitutional defects is beside the point. See Resp. Br. 21-22, 30. Those decisions, arising in a different setting, do not authorize Article I military courts, which lack a basis of jurisdiction, to exercise a similarly broad scope of collateral review. In any event, military law traditionally has reflected a narrower conception of jurisdictional defects. See, *e.g.*, *Wright* v. *United States*, 2 M.J. 9, 10 (C.M.A. 1976) (counsel error "is not of jurisdictional magnitude"); R.C.M. 201(a)(1), discussion note ("'Jurisdiction' means the power to hear a case and to render a legally competent decision."); R.C.M. 201(b)

3. The military courts also lack jurisdiction because respondent is a former service member no longer subject to the UCMJ

In our opening brief (at 29-32), we argued that the military appellate courts lacked jurisdiction to hear respondent's coram nobis petition for the independent reason that respondent was no longer a service member subject to the UCMJ. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14-15 (1955); U.S. Const. Art. I, § 8, Cl. 14; 10 U.S.C. 802. That is not an impediment that can be waived by consent. See *McClaughry*, 186 U.S. at 66 (accused's "consent could no more give jurisdiction to the court[-martial], either over the subject-matter or over his person, than if it had been composed of a like number of civilians"); *United States* v. *Meadows*, 13 M.J. 165, 168 n.4 (C.M.A. 1982) ("an accused cannot create court-martial jurisdiction by consent"); cf. R.C.M. 907(b)(1)(A).

Respondent relies (at 23-24) on direct-review cases holding that an intervening discharge does not divest the military courts of jurisdiction to complete the appellate process (including ordering of a retrial). But that line of cases, which the government acknowledged and distinguished (Br. 31 n.8), is limited to facilitating the completion of the statutorily prescribed appellate process. See *Smith* v. *Vanderbush*, 47 M.J. 56, 59 (C.A.A.F. 1997) ("[T]he concept of continuing jurisdiction may be applied *for the limited purpose* of permitting appellate

---

(enumerating five traditional "*[r]equisites of court-martial jurisdiction*"); see also *Trials by Courts-Martial: Hearings on S. 5320 Before the Senate Comm. on Military Affairs*, 65th Cong., 3d Sess. 8-9 (1919) (testimony of Brig. Gen. Samuel T. Ansell) (referring to a court-martial that lacked jurisdiction as a proceeding "*coram non judice*," *i.e.,* not in the presence of a judge).

review and execution of the sentence in the case of someone who already was tried and convicted while in a status subject to the UCMJ.") (emphasis added). This case is readily distinguishable, as direct appellate review under the UCMJ was completed nearly a decade ago and respondent's military status was terminated by execution of a bad-conduct discharge soon thereafter.

Contrary to respondent's implication, the government does *not* assert the power to retry by court-martial a discharged service member after the appellate process has run its course—at least after his enlistment period has expired and he is no longer in military custody. See 10 U.S.C. 802. Accordingly, such claimants seeking collateral review would benefit from an unintended windfall: reversal of the conviction (perhaps, as here, through no fault of the government) with no risk of retrial and conviction by another court-martial. That consequence provides another reason why this Court should not permit coram nobis review—often arising long after the enlistment period has expired—within the military justice system.

Although an Article 73 "petition for a new trial may be submitted by the accused * * * regardless whether the accused has been separated from the service" (R.C.M. 1210(b)), that petition is submitted to the JAG (and referred to the military courts for resolution only if the appellate process is pending). Contrary to respondent's suggestion (Br. 24-25), neither the UCMJ nor the Rules of Court-Martial provide that a discharged service member whose enlistment period has expired may be retried by a court-martial if an Article 73 petition were granted. Rather, if such a case were to arise, the military presumably would substitute an administrative discharge for any bad-conduct discharge pursuant to Arti-

cle 75(b). See 10 U.S.C. 875(b) ("the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment"). Accordingly, Article 73 does not undermine the government's denial of military court jurisdiction to hear respondent's coram nobis petition.[12]

B. Coram Nobis Review Of The Merits Of A Final Court-Martial Conviction Is Neither Necessary Nor Appropriate

Even if a military appellate court had jurisdiction to collaterally review the merits of a final court-martial judgment, the court would still lack authority under the All Writs Act to issue the writ of error coram nobis because it is neither "necessary" nor "appropriate." 28 U.S.C. 1651(a); Gov't Br. 32-40. Even assuming that coram nobis remains available in Article III courts in narrow situations that this Court has considered "difficult to conceive" (*Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (citation omitted)), extending that remedy to Article I military courts does not comport with the design of the military justice system.

1. Respondent does not dispute the general availability of several of the alternatives for military and federal court review described in the government's opening

[12] Respondent also argues (Br. 25 n.10) that, if the government were correct that *Toth* bars a military appellate court from granting collateral relief to a former service member after completion of direct appellate review, the same jurisdictional limitation would also apply to Article III courts and to the Court of Federal Claims. As discussed in the government's opening brief (at 32), that contention is incorrect: the jurisdiction of those courts is not constitutionally confined to persons subject to the UCMJ but rather embraces anyone whose claims fall within the scope of their respective jurisdictions.

brief (at 33-35) for a similarly situated claimant who acts within the various time limits set by Congress. Rather, respondent contends (Br. 28-34) only that he does not (at least no longer) qualify for any of them and that, consequently, this Court should permit him to seek coram nobis relief in the military appellate courts. But respondent's failure (justifiable or not) to pursue any available alternatives does not license Article I military courts to grant relief that exceeds their "narrowly circumscribed" jurisdiction. *Goldsmith*, 526 U.S. at 535. The exhaustion argument made by respondent's amicus (Br. of Law Professors 9-15) fails for a similar reason: while a party must exhaust existing military remedies, that does not justify the judicial creation of new remedies that Congress has not authorized. See Gov't Br. 34-35.

Moreover, in assessing whether collateral relief was "necessary" or "appropriate," the Court in *Goldsmith* did not confine its analysis to whether the particular litigant did or could still avail himself of alternative remedies; rather, it examined whether such remedies were generally available in the relevant class of cases. See 526 U.S. at 537 (discussing "alternative remedies available to *a servicemember*" seeking the type of relief at issue) (emphasis added); *id.* at 537 n.11 (noting availability of habeas corpus review in federal court even though "respondent chose not to challenge his underlying conviction"); *id.* at 537-538 ("administrative bodies in the military, and the federal courts, have the authority to provide administrative or judicial review *of the action* challenged by respondent") (emphasis added); *id.* at 538 n.12 (noting that the military review board was "legislatively authorized to provide the relief sought by respondent" even though "respondent chose to circumvent" it); *ibid.* (finding that his "constitutional objections *could*

have been addressed by the federal courts") (emphasis added); see also Gov't Br. 35.

2. Respondent also attempts (Br. 34) to characterize the government's objection to his pleading as a mere labeling issue. But the government's argument (Br. 36-39 & n.9) is that *neither* coram *nobis* nor coram *vobis* is proper because the court-martial which tried the case has long since dissolved. The lack of a standing trial court not only makes use of those common law writs inconsistent with their historical contours but poses real legal and practical problems. The UCMJ, for example, contains no statutory mechanism for litigating factual issues on collateral review; the military appellate courts thus have ordered the creation of fact-finding tribunals for that purpose on an ad hoc basis. See *United States* v. *DuBay*, 37 C.M.R. 411 (C.M.A. 1967). That "unwieldy and imperfect system," Pet. App. 47a (Ryan, J. dissenting), in turn, diverts a military judge, prosecutorial and defense counsel, and other military personnel—none of whom likely will have had prior involvement in the case—from their primary responsibilities in administering justice and discipline within the armed forces.[13] There

[13] Respondent notes (Br. 37) that a former service member has no constitutional right to representation by military defense counsel to mount a collateral attack and contends that military counsel was made available to represent him "as a matter of grace." The lack of any *constitutional* right to counsel is beside the point, because Article 70(c)(2) imposes a *statutory* requirement that "[a]ppellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court * * * when the United States is represented by counsel." 10 U.S.C. 870(c)(2). The provision does not distinguish between direct and collateral review (presumably because Congress had not intended collateral review in the first place). And because *DuBay* hearings have been considered court-martial proceedings, Article 27 appears to

is no indication in historical practice, the text of the UCMJ, or its legislative history that Congress intended the military justice system to undertake such burdens. See *Solorio* v. *United States*, 483 U.S. 435, 447 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.").

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the CAAF should be reversed.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General

MARCH 2009

---

require appointment of military defense counsel. 10 U.S.C. 827(a)(1) ("Trial counsel and defense counsel shall be detailed for each general and special court-martial."); see *United States* v. *Rodriguez*, 60 M.J. 239, 253-254 (C.A.A.F. 2004).

APPENDIX

28 U.S.C. 1259 provides:

Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.